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STITES & HARBISON PLLC
1199 NORTH FAIRFAX STREET
SUITE 900
ALEXANDRIA VA 22314

In re Application of
Timothy J. Foster et al.
Application No. 10/690,184
Filed: October 21, 2003
Attorney Docket No. P06335US05/BAS

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APR 05 2004

OFFICE OF PETITIONS

DECISION DISMISSING
PETITION

This is a decision on the petition filed February 9, 2004, requesting that the above-identified application be accorded a filing date of October 21, 2003 with Figure 4 described in the specification as a part of the original disclosure.

The application was filed October 21, 2003 but on January 26, 2004, the Office of Initial Patent Examination (OIPE) mailed a Notice of Omitted Item(s) in a Nonprovisional Application stating that the application had been accorded a filing date of October 21, 2003 but that Figure 4 described in the specification (description and claims) appeared to have been omitted from the application.

In response, on February 9, 2004, the present petition was filed. Petitioner argues that Figure 4 was included on pages 19/28, 20/28 and 21/28 and was not missing on October 21, 2003. In support, a copy of petitioner's postcard receipt was supplied with the present petition. Petitioner requests that the application be accorded a filing date of October 21, 2003 with Figure 4 as a part of the original disclosure.

The argument and evidence supplied with the petition have been carefully considered, but are not persuasive. The USPTO has a well-established and well-publicized practice of providing a receipt for papers filed in the USPTO to any applicant desiring a receipt. The practice requires that any paper for which a receipt is desired be filed in the USPTO with a self-addressed postcard identifying the paper. A postcard receipt which itemizes and properly identifies the papers which are being filed serves as prima facie evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO. See section 503, Manual of Patent Examining Procedure (MPEP 503).

Unfortunately, in this case, petitioners' postcard receipt fails to properly itemize the papers allegedly filed in this application. The postcard receipt does not itemize the number of sheets and figures of drawings filed and instead only indicates that drawings were filed. A postcard receipt will not serve as prima facie evidence of receipt in the USPTO of any items which are not properly itemized and identified.

The petition is dismissed.

It is noted that the application transmittal cover sheet indicates that the above identified application is a divisional application of prior filed application no. 09/386,962 and is incorporated by reference herein in their entirety. MPEP 201.06© states that:

an applicant may incorporate by reference the prior application by including, in the application-as-filed, a statement that such specifically enumerated prior application or applications are "hereby incorporated herein by reference." The statement may appear in the specification or in the application transmittal letter. The inclusion of this incorporation by reference of the prior application(s) will

permit an applicant to amend the continuing application to include any subject matter in such prior application(s), without the need for a petition. (emphasis supplied)

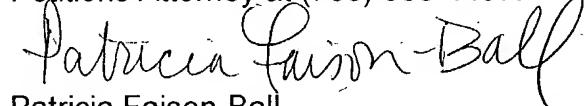
Obviously, in view of the incorporation by reference of the prior application, Figure 4, of the specification is not new matter if it was a part of the disclosure of the prior application.

Petitioner may file Figure 4 (pages 19/28, 20/28 and 21/28) as a preliminary amendment.

As this petition was necessitated by applicants' filing error rather than an error on the part of the Office, the petition fee will not be refunded.

The application is being returned to the Office of Initial Patent Examination for further processing with a filing date of October 21, 2003, using the application papers filed on that date.

Telephone inquiries regarding this decision should be directed to the undersigned Petitions Attorney at (703) 305-4497.



Patricia Faison-Ball
Senior Petitions Attorney
Office of Petitions